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No. 93-1682

In The

Supreme Court of the United States

October Term, 1993

BALCOR REAL ESTATE HOLDINGS, INC., f/k/a BALCOR REAL ESTATE FINANCE, INC.,

Petitioner,

v.

H. CHRISTOPHER CLARK, Trustee of the Bankruptcy Estates of Meridith Hoffman Partners and Meridith Millard Partners,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

I. INTRODUCTION

H. Christopher Clark, Trustee of the Bankruptcy Estates of Meridith Hoffman Partners, a Colorado general partnership (hereinafter "Hoffman") and Meridith Millard partners, a Nebraska general partnership (hereinafter "Millard") commenced this case as an adversary proceeding in the United States Bankruptcy Court for the

District of Colorado. H. Christopher Clark serves as the Chapter 7 Trustee for both the Hoffman and Millard bankruptcy estates. The Hoffman and Millard estates are not substantively consolidated nor are the cases jointly administered.

The Trustee commenced this case to recover under 11 U.S.C. § 547(b) preferential transfers by Hoffman and Millard to Balcor Real Estate Finance, Inc. now known as Balcor Real Estate Holdings, Inc. (hereinafter "Balcor") within one year prior to the filing of the bankruptcy petitions. The Complaint requested that judgment enter in favor of the Hoffman Estate in the amount of $140,128.94 and that judgment enter in favor of the Millard Estate in the amount of $251,722.44.

The Bankruptcy Court held that the transfers to Balcor by Hoffman and Millard within the year prior to the filing of the petitions were voidable preferences under 11 U.S.C. § 547(b). The Bankruptcy Court further held that Balcor failed to meet its burden of proof to sustain its ordinary course of business defense under 11 U.S.C. § 547(c)(2). Accordingly, the Bankruptcy Court entered judgment in favor of the Trustee for the recovery of the transfers as requested in the Complaint. The Bankruptcy Court's decision was affirmed on appeal by the United States District Court for the District of Colorado and subsequently affirmed by the United States Court of Appeals for the Tenth Circuit.

II. THE LOAN TRANSACTIONS

A. Execution of the Escrow Agreements

The critical issue raised in the case concerning Balcor's ordinary course of business defense was whether payments made under certain escrow agreements between Balcor, the Debtors and an escrow agent, met the requirements of 11 U.S.C. § 547(c)(2).[1] Under the escrow agreements, all rents received from the Debtors' real properties were deposited into an escrow account maintained by the escrow agent, Jesse N. Lipschuetz, P.C. Balcor's prior written consent was required before any disbursements of any amount could be made from the escrow accounts.

The evidence established the escrow agreements were not executed until the Balcor loans were in default. Although the Hoffman Note was executed on January 30, 1985, the Hoffman Escrow Agreement was not executed until October 3, 1986, twenty months later. The Millard Note was executed on September 8, 1986, however, the Millard Escrow Agreement was not executed until December 1, 1987, fifteen months later. Despite the fact the Millard Note was executed less than a month before the execution of the Hoffman Escrow Agreement, the

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[1] At the time of the transfers, Balcor did not have a perfected security interest in the rents or receivables of the Debtors. Although both Hoffman and Millard executed an Assignment of Rents in favor of Balcor, Balcor did not perfect the assignment of rents against either Debtor under controlling state law until it filed notices pursuant to 11 U.S.C. § 546(b) after the filing of the Bankruptcy petitions.

Millard Escrow Agreement was not executed until sixteen months after the Hoffman Escrow Agreement.

The evidence established that Hoffman and Millard were delinquent in making payments and were in default at the time of the execution of their respective escrow agreements. Michael Doyle, who served as Vice President, Property Management for Banc Properties Services, Inc., the property manager, testified that although he did not know if Balcor had formally declared the loans in default, at the time each escrow agreement was executed, the Debtor was delinquent in making payments.

Balcor failed to meet its burden of proof to establish that the payments under the escrow agreements were made in the ordinary course of business. The evidence established that within the commercial real estate industry, escrow agreements, such as those executed by Hoffman and Millard, are executed only when loans are in default and as a means to prevent the lender from foreclosing. Greg Rice, President, Banc Properties Services, Inc., testified that during the relevant time period he was involved in the management of approximately 125 commercial properties and that a majority of the properties he managed were financed by a commercial lender. Mr. Rice testified that of these properties less than 10% operated under an escrow agreement and further the escrow agreements arose only in cases where the lender was about to foreclose or there were other lender relationship problems. Mr. Rice further testified that it was not ordinary or routine for the Meridith Organization[2] and other property

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[2] The Meridith Organization, was a general partner of Hoffman and Millard as well as eight or nine other partnerships,

owners to enter into escrow agreements unless there were lender relationship problems.

B. Operation Under the Escrow Agreements

Under the escrow agreements, Balcor controlled the timing and amount of all payments made by Hoffman and Millard. The escrow agent collected all rents from the Debtors" real properties, and then deposited them in two separate escrow accounts maintained by the escrow agent. Periodically, Banc Properties Services, Inc., the property manager, forwarded disbursement requests, including invoices and checks to the escrow agent and Balcor. The disbursement requests included payments to trade creditors as well as mortgage payments. Under the escrow agreements, no disbursements were made on behalf of either Hoffman or Millard without the prior written consent of Balcor.

The evidence showed that Balcor exercised its powers under the escrow agreements for its own benefit by controlling the disbursement of accounts payable and the timing of payments.[3] Balcor utilized its rights under

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including partnerships which owned and managed commercial real estate, namely shopping centers.

[3] Balcor argues in footnote 5 of the Petition for Writ of Certiorari that the Tenth Circuit's decision did not acknowledge the findings of the bankruptcy court and district court that Balcor did not exercise sufficient control to be found to be an insider under 11 U.S.C. § 101(31). In finding that Balcor was not an insider the lower courts determined that the control over the financial affairs was not tantamount to control over the debtors operations. The conclusion that Balcor was not an insider under

the Escrow Agreements to: 1) require Millard and Hoffman to bring the Balcor loans current before it would authorize payments to any other creditors; 2) insure the mortgage payments were made prior to payments to trade creditors resulting in significant delays in payments to vendors, 3) direct the amount of leasing commissions and management fees which could be paid by the Debtors and 4) disallow legal fees earned in connection with the properties.[4]

The evidence established that Balcor utilized its disbursement control over the Debtors to ensure that its mortgage payments were paid prior to payments to trade creditors by delaying the timing of the approval of the disbursement requests to trade creditors. The Trustee introduced evidence which showed disbursement requests dated May 6 and May 13, 1988, which requested approval to make a mortgage payment to the first deed of trust holder, a mortgage payment to Balcor and payments to trade creditors. The payments to the mortgage lenders under these requests were approved and made within five days on May 11 and May 17, 1988, respectively, however, the disbursements to the trade creditors were not approved until July 1, 1988. The evidence established

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11 U.S.C. § 101(31) does not, however, preclude the Court's finding that Balcor held financial control of the Debtors under the escrow agreements, as the two are not mutually exclusive.

[4] Balcor continues to argue in footnote 5 of the Petition for Writ of Certiorari its rendition of the facts which it asserts the Tenth Circuit failed to consider. The Tenth Circuit viewed the record, including the facts asserted by Balcor, and determined that the factual conclusions of the Bankruptcy Court, affirmed by the District Court, were not clearly erroneous.

that Balcor used its disbursement authority to prefer itself in the Hoffman case to ensure that the mortgage payments were paid six weeks prior to the disbursements to the trade creditors.

III. THE OPINIONS BELOW

The United States Court of Appeals for the Tenth Circuit affirmed the decision of the bankruptcy court and the district court based on its determination that the factual findings were not clearly erroneous. The Tenth Circuit stated:

> Because this conclusion is primarily factual, we must accept it unless it is clearly incorrect.

12 F.3d at 1553. Petition App. 3.

The Tenth Circuit noted that the legislative history reflects that the purpose of the ordinary course of business exception is:

> "to leave undisturbed normal financing transactions, because it does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy."

12 F.3d at 1553, Petition App. 4 (quoting S. Rep. No. 989, 95th Cong., 2d Sess. 88 (1978), 1978 U.S.C.C.A.N. 5787, 5874).

The Tenth Circuit further stated:

> The preference section does not discourage "unusual action" simply because others in the

> industry wouldn't respond to similar circumstances in the same way. It discourages "unusual action" that may favor certain creditors or hasten bankruptcy by alarming other creditors and motivating them to force the debtor into bankruptcy to avoid being left out.

12 F.3d at 1553, Petition App. 4-5.

The Tenth Circuit held the record supported the factual findings upon which the bankruptcy court relied in holding that Balcor failed to sustain its burden of proof under Section 547(c)(2). The Tenth Circuit concluded that the escrow arrangement was not a normal financing relationship and that creditors in the industry used such arrangements only in extraordinary circumstances. The Tenth Circuit stated:

> The escrow arrangement with Balcor was not a normal financing relationship. The record shows that creditors in the industry use such an arrangement only in extraordinary circumstances, when debtors are in trouble. (record citation omitted). The record also suggests that Balcor entered the escrow agreement with the debtors because the debtors were delinquent and Balcor was worried about getting paid. (record citation omitted). **Furthermore, the escrow agreement enabled Balcor to favor itself**. Balcor occasionally used this power to make sure that money was available for itself by denying other payments. **The record supports the finding that Balcor used its authority to delay payments to other creditors and to pay its mortgage first. (record citation omitted). Balcor also conditioned payments to trade creditors upon receipt of payments to itself and denied payment of certain expenses.**

> (record citation omitted). **The payments therefore were made according to terms that were not used in normal or ordinary situations and that made it possible for Balcor to favor itself, thus increasing the risk of bankruptcy as well.**

12 F.3d at 1554, Petition App. 5-6. (emphasis added).

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I.

THE DECISION BELOW HAS NOT CREATED A SPLIT IN THE CIRCUIT AUTHORITY IN THE INTERPRETATION AND APPLICATION OF 11 U.S.C. § 547(c)(2).

The premise of Balcor's Petition for Writ of Certiorari is that the decision below directly contradicts authorities on point from the Seventh, Eighth and Fourth Circuits citing *Matter of Tolona Pizza Products Corp.*, 3 F.3d 1029 (7th Cir. 1993); *Jones v. United Sav. and Loan Assn. (In re U.S.A. Inns of Eureka Springs, Arkansas, Inc.)*, 9 F.3d 680 (8th Cir. 1993); *Harman v. First American Bank of Maryland (In re Jeffrey Bigelow Design Group, Inc.)*, 956 F.2d 479 (4th Cir. 1992). A careful reading of the relevant decisions shows that the Tenth Circuit's decision does not create a split of authority in the circuits of the type requiring this Court's review. To the extent the decision below is distinguishable from the cited decisions, the distinction is primarily due to factual differences. Since the ordinary course of business defense under 11 U.S.C. § 547(c)(2) is a factually driven determination, the alleged legal distinctions, argued by Balcor, in the tests for the application of Section 547(c)(2)(C) and the phrase "ordinary business

terms" are not material. This is particularly true in this case as Balcor would have failed to meet its burden of proof that the escrow agreements did not violate the policies behind the preference statute under the interpretation used by any of the Courts. Due to the fact that this is a primarily factual determination with the same result under any interpretation, there are no special and important reasons for this Court to grant certiorari.

Each of the Circuit Courts begin their interpretation of 11 U.S.C. § 547(c)(2) with the legislative history which provides:

> The purpose of this exception is to leave undisturbed normal financial relations because it does not detract from the general policy of the section to discourage unusual action by either the debtor or his creditors during the debtors slide into bankruptcy.

S. Rep. No. 989, 95th Cong., 2d Sess. 88 (1978), 1978 U.S.C.C.A.N. 5787, 5874.

The Tenth Circuit and the other Circuit Courts agree that the preference section:

> "discourages unusual action that may favor certain creditors or hasten bankruptcy by alarming other creditors and motivating them to force the debtor into bankruptcy to avoid being left out."

In re Meridith Hoffman Partners, 12 F.3d at 1553 (citing *Matter of Tolona Pizza Prods. Corp.*, 3 F.3d 1029, 1032 (7th Cir. 1993) and *In re Jeffrey Bigelow Design Group, Inc.*, 956 F.2d 479, 488 (4th Cir. 1992). See also *Fiber Lite Corporation v. Molded Acoustical Products, Inc. (In re Molded Acoustical Products, Inc.)*, 18 F.3d 217 (3rd Cir. 1994).

The Seventh Circuit in *Matter of Tolona Pizza Products Corp.*, stated:

> The purpose of the preference statute is to prevent the debtor during his slide toward bankruptcy from trying to stave off the evil day by giving preferential treatment to his most importunate creditors, who may sometimes be those who have been waiting the longest to be paid. Unless the favoring of particular creditors is outlawed, the mass of creditors of a shaky firm will be nervous, fearing that one or a few of their number are going to walk away with all the firm's assets; and this fear may precipitate debtors into bankruptcy earlier than is socially desirable.

3 F.3d at 1032 (citations omitted).

The Circuit Courts concur that the application of the ordinary course of business defense is primarily a factual determination. *In re Meridith Hoffman Partners*, 12 F.3d at 1553; *In re U.S.A. Inns of Eureka Springs, Arkansas*, 9 F.3d at 683; *In re Jeffrey Bigelow Design Group, Inc.*, 956 F.2d at 486. *Waldschmidt v. Ranier (In re Fulghum Construction Corp.)*, 872 F.2d 739, 743 (6th Cir. 1988).

The Tenth Circuit's decision that Balcor failed to establish that payments made under the escrow agreements were made pursuant to "ordinary business terms" under 11 U.S.C. § 547(c)(2)(C) was based upon its conclusion the record supported the factual determinations of the courts below that the escrow agreements were not usual financing transactions and that the escrow agreements created a situation in which Balcor had the ability,

which it exercised, to favor itself. These factual determinations comprise the distinguishing factor, if there is one, between the decision below and the decisions of the other Circuit Courts. The majority of the cases cited by Balcor are factually distinguishable as they do not involve unusual collection practices but rather concern the timing of payments to unsecured creditors without disparate treatment to a particular creditor. In *Fiber Lite Corporation v. Molded Acoustical Products, Inc. (In re Molded Acoustical Products, Inc.)*, 18 F.3d 217 (3rd Cir. 1994), the one case cited by Balcor which dealt with issues beyond timing of payments, the Court also concluded that by instituting a payment plan and mounting pressure to increase the payments, the creditor had failed to meets its burden of proof under the ordinary course of business defense.

In order to support a perceived conflict between the Circuit Courts, Balcor isolates a single statement in the Tenth Circuit's opinion, disregarding the substance of its decision. Balcor asserts that the Tenth Circuit has imposed a "healthy business" requirement which contradicts the opinions of other Circuit Courts that measure ordinariness within an industry which routinely deals with businesses in trouble.

The Tenth Circuit relied on the very decisions which Balcor asserts create a divisive split in circuit authority. The Tenth Circuit concurred with and cited the Seventh Circuit's decision in *Tolona Pizza Prods. Corp.* and the Fourth Circuit's decision in *In re Jeffrey Bigelow Design Group, Inc.* when it held:

> The preference section does not discourage "unusual action" simply because others in the industry would not respond to similar circumstances in the same way. It discourages "unusual action" that may favor certain creditors or hasten bankruptcy by alarming other creditors and motivating them to force the debtor into bankruptcy to avoid being left out.

In re Meridith Hoffman Partners 12 F.3d at 1553.

The focus of the Tenth Circuit's analysis as to whether Balcor sustained its burden of proof under Section 547(c)(2)(C) was whether the escrow agreements and Balcor's enforcement of its rights thereunder, raised the dangers that the preference section seeks to avoid. While the Tenth Circuit noted that terms used in healthy debtor/creditor relationships do not raise the dangers that the preference section seeks to avoid, namely inequitable treatment of creditors, it did not, as Balcor suggests, make a "healthy relationship" a requirement of Section 547(c)(2). The Tenth Circuit recognized that arrangements required by creditors conducting business with struggling debtors *may* give a creditor an advantage and precipitate bankruptcy. In other words, the Tenth Circuit concluded that debtor/creditor relationships established while a Debtor is struggling require scrutiny to determine whether the policies of the preference section have been met. The Tenth Circuit did not limit the availability of the ordinary course of business defense only to healthy relationships but rather held that terms which are not utilized in healthy relationships will require scrutiny and not meet the requirements of 11 U.S.C. § 547(c)(2)(C) unless it is established that the terms do not conflict with

the policies of the preference section and therefore do not confer an undue advantage upon the creditor.[5]

The Tenth Circuit's analysis is consistent with the legislative history and the decisions rendered by the other Circuit Courts. Each of the Circuit Courts recognize that the ordinary course of business defense applies to normal terms, not unusual transactions. The distinguishing factor in the case below is that the record established that the escrow agreements enabled Balcor to favor itself, which Balcor in fact did. This is consistent with the recognition of the other Circuit Courts that the ordinary course of business defense is not available where a particular creditor is favored. The Seventh Circuit in *Matter of Tolona Pizza Products Corp.* specifically found that there was no hint that the dealings were designed to favor the particular creditor. 3 F.3d at 1033. Similarly the Fourth Circuit in *In re Jeffrey Bigelow Design Group, Inc.* stated that:

> Congress was concerned that creditors would race to the courthouse to dismember the creditor or that a debtor would favor certain creditors over others, and by enacting the ordinary course exception, Congress wished to except normal transactions which do not promote these two concerns.

956 F.2d at 488.

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[5] This construction of the Tenth Circuit's decision is consistent with the Tenth Circuit's recognition that while the filing of a lawsuit to enforce a debt may not be unusual when a debtor does not pay, payments under a settlement agreement are not made according to ordinary business terms citing *Gull Air, Inc. v. Beech Acceptance Corp. (In re Gull Air)*, 82 B.R. 1, 3-4 (Bankr. D. Mass. 1988).

The Eighth Circuit recognized that dealings which are extraordinary fall outside of the provisions of 547(c)(2)(C). *In re U.S.A. Inns of Eureka Springs, Arkansas*, 9 F.3d 680, 685 (8th Cir. 1993).

The Tenth Circuit acknowledged that there are two possible interpretations of the phrase "ordinary business terms" since the phrase is not defined by the Bankruptcy Code. First, terms used by creditors in similar situations, even if the situation itself is extraordinary (citing *Jones v. United Sav. & Loan Ass'n (In re U.S.A. Inns of Eureka Springs, Arkansas)*, 9 F.3d 680, 685 (8th Cir. 1993) or second, terms used in usual or ordinary situations. *In re Meridith Hoffman Partners*, 12 F.3d at 1553. The Tenth Circuit concluded that the latter interpretation supported the purposes of the preference section. The Tenth Circuit's decision was followed by the Third Circuit in *Fiber Lite Corporation v. Molded Acoustical Products, Inc. (In re Molded Acoustical Products, Inc.)*, 18 F.3d 217 (3rd Cir. 1994).

Balcor argues that the Tenth Circuit's decision is irreconcilable with the Eighth Circuit's decision in *In re U.S.A. Inns of Eureka, Arkansas*, 9 F.3d 680 (8th Cir. 1993), which held the terms are analyzed in the context of creditors dealing with the same or similar problems. Although the Tenth and Eighth Circuits have defined the phrase "ordinary business terms" differently, this distinction does not set forth a conflict between the circuits where special and important reasons require that this Court grant the Petition for Writ of Certiorari, because

under either interpretation of the phrase "ordinary business terms", the Court would have reached the conclusion that Balcor failed to sustain its burden of proof as the escrow agreements were found to benefit Balcor to the detriment of other creditors, in contravention of the policies of the preference section and the legislative history. The Tenth Circuit determined that these factual findings were supported by the record and were not clearly erroneous.

The Eighth and Tenth Circuits concur that the decision as to whether the ordinary course of business defense applies is primarily a factual determination. *In re U.S.A. Inns of Eureka, Arkansas*, 9 F.3d at 683; *In re Meridith Hoffman Partners*, 12 F.3d at 1553. The Eighth Circuit stated:

> This court has indicated that "there is no precise legal test which can be applied in determining whether payments by the debtor during the 90-day period were, 'made in the ordinary course of business'; 'rather th[e] court must engage in a "peculiarly factual" analysis.' "

9 F.3d at 682-683 (citation omitted).

Even if the Tenth Circuit had followed the analysis applied by the Eighth Circuit, based on the factual conclusions that the escrow agreements enabled Balcor to favor itself, the Court would have reached the conclusion the ordinary course of business defense was inapplicable. The real distinction between this case and *In re U.S.A. Inns of Eureka, Arkansas* is that *In re U.S.A. Inns* dealt only with issues of delayed payments found to be ordinary within the industry, as opposed to an unusual collection

practice conveying financial control of the debtor to a single creditor, which was not an ordinary business term within the industry. The decisions of the Eighth and Tenth Circuits are not irreconcilable and do not raise special and important issues requiring resolution by this Court.

The Third Circuit Court of Appeals in *In re Molded Acoustical Products, Inc.*, 18 F.3d 217 (3rd. Cir. 1994), recognized that the decision as to whether the ordinary course of business defense has been established is a factual determination which must be analyzed in each case. Balcor argues that the Third Circuit's decision reinforces the fundamental split in authority between the circuits. To the contrary, the Third Circuit notes that the issue involves a factual determination which eschews a bright line approach and must be considered in each case. The Third Circuit adopted the definition of ordinary business terms utilized by the Seventh Circuit, and followed by the Tenth Circuit. The Third Circuit recognized that the Seventh, Eighth, and Tenth Circuits have all held that the preference provisions are designed not to disturb normal debtor-creditor relationships but rather to derail unusual ones which threaten to heighten the risk of bankruptcy and disrupt the paramount policy of equitable treatment of creditors. The Third, Eighth and Tenth Circuits all follow the Seventh Circuit's analysis in *Matter of Tolona Pizza Products Corp.*

Balcor also argues that there is a conflict between the Seventh and Tenth Circuits in the priority afforded Section 547(c)(2)(C). Balcor asserts that the Seventh Circuit has determined that the ordinary business terms element

in Section 547(c)(2) is a lesser element in the determination than the Section 547(c)(2)(B) element and that therefore the Tenth Circuit has inverted that priority by concluding that Section 547(c)(2)(C) could not be met and therefore the defense is inapplicable. First, there is no basis in the statutory language or this Court's decision in *Union Bank v. Wolas*, ___ U.S. ___, 112 S. Ct. 527, 533, 116 L. Ed.2d 514 (1991), which supports the argument that (C) is a lesser element. The statute requires that all three elements of Section 547(c)(2) must be met. Second, Balcor misstates the analysis applied by the Seventh Circuit. While the Seventh Circuit commenced its analysis by stating that one interpretation is that the most important factor is the relationship between the parties, the Seventh Circuit rejected this interpretation, acknowledging that under the analysis advocated by Balcor the (C) element would add nothing to the first two subsections. The Seventh Circuit concluded that the creditor must show that the payment received was made in accordance with ordinary business terms in the industry. *Matter of Tolona Pizza Prods.*, 3 F.3d at 1032-1033. In order to sustain a defense under Section 547, each of the elements of Section 547(c)(2) must be met and therefore there is no basis to assert that the Tenth Circuit's decision is inconsistent with existing authority on the issue or is an incorrect interpretation simply because the Tenth Circuit resolved the issue on Balcor's inability to satisfy the Section 547(c)(2)(C) requirement.

In sum, the Tenth Circuit's decision is consistent with the policies of the preference provisions to promote equal treatment of creditors. Each of the Circuits have held that the "ordinary business terms" provision does not extend

to practices which are unusual or which do not promote the policies of the preference section. Further the Circuit decisions acknowledge the defense involves a peculiarly factual determination for which a bright line interpretation is inappropriate. Whether the phrase "ordinary" is defined to mean normal in the case of struggling debtors or the type utilized in healthy relationships, where no undue pressure is asserted by the creditor, the Court would have concluded that Balcor failed to meet its burden of proof. Balcor has not set forth special and important reasons that this Court grant the petition for writ of certiorari.

II.

THE DECISION BELOW IS CONSISTENT WITH *BARNHILL V. JOHNSON*

The Tenth Circuit's decision is consistent with *Barnhill v. Johnson*, ___ U.S. ___, 112 S. Ct. 1386, 118 L. Ed. 2d 39 (1992). In *Barnhill v. Johnson*, this Court simply stated:

> These sections are designed to encourage creditors to continue to deal with troubled debtors on normal business terms by obviating any worry that a subsequent bankruptcy filing might require the creditor to disgorge as a preference an earlier received payment.

112 S.Ct. at 1391.

There is no basis to support Balcor's premise that the Tenth Circuit's decision is inconsistent with this Court's decision in *Barnhill v. Johnson*. Both cases hold that the ordinary course of business defense is available to a creditor who deals with struggling debtors on normal

business terms, terms which are not inconsistent with the policies behind the preference section. There is no support for Balcor's arguments that in *Barnhill v. Johnson* that this Court held that provisions which favor a creditor and provide special treatment will be in the ordinary course of business provided creditors dealing with troubled debtors would utilize such a provision. The ordinary course of business provision is a protection for relationships which do not impede the policies of the Bankruptcy Code to promote equality of treatment for creditors not a safe harbor for creditors who require disparate and inequitable treatment as a "cost" of continuing to do business with a struggling debtor. The Tenth Circuit's decision promotes the policies behind the preference provisions and is consistent with the legislative history. The Tenth Circuit's decision does not discourage creditors from dealing with struggling debtors. It simply provides that if creditors impose economic constraints upon the debtor and utilize provisions conveying control and favoritism to the creditor, that payments made to that creditor will not be protected by the ordinary course of business defense.

CONCLUSION

Balcor has not set forth any special and important reasons for this Court to grant the Petition for Writ of Certiorari. In order to establish a perceived conflict between the Circuits, Balcor disregards the substance of the Tenth Circuit's decision and relies on an isolated

statement taken out of context. The Tenth Circuit recognized that terms used in healthy debtor/creditor relationships do not raise the danger that the preference section seeks to avoid, namely inequitable treatment of creditors. The Tenth Circuit did not limit the availability of the ordinary course of business defense to healthy relationships but rather held that terms which are not utilized in healthy relations require scrutiny and will not meet the requirements of 11 U.S.C. § 547(c)(2)(C) unless it is established that the terms do not conflict with the policies of the preference section and do not confer an undue advantage upon the creditor.

The Tenth Circuit's decision is consistent with the policies of the preference section as set forth in the legislative history and is not in conflict with the circuit court decisions set forth above. The ordinary course of business defense involves issues which are predominantly factual. In this case, the Tenth Circuit concluded that the factual findings were not clearly erroneous and that under the escrow agreements Balcor had the ability, which it utilized, to favor itself over other creditors. Based on these conclusions, whether the terms were analyzed in the context of terms utilized in similar, even extraordinary situations, or terms utilized in usual or ordinary situations, the Court would have reached the conclusion that Balcor failed to meet its burden of proof under 11 U.S.C. § 547(c)(2).

The Tenth Circuit's decision is consistent with the policies behind the preference section and this Court's decision in *Barnhill v. Johnson*, ___ U.S. ___, 112 S. Ct. 1386, 118 L. Ed.2d. 39 (1992). The ordinary course of

business defense is a protection for debtor/creditor relationships which do not impede the policies of the Bankruptcy Code. The purpose of the ordinary course of business defense is not to provide a safe harbor for creditors who require disparate and inequitable treatment as a "cost" of continuing to conduct business with a struggling debtor. There is no special and important reason for this Court to grant certiorari, and we respectfully request the Court deny Balcor's Petition for Writ of Certiorari.

Respectfully submitted,

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